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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

9 DAVID MCFERRIN and KATHERINE
10 MCFERRIN, et al.,

11 Plaintiffs,

12 v.

13 OLD REPUBLIC TITLE, LTD.,

14 Defendant/Third-
Party Plaintiff,

15 v.

16 TROY X. KELLEY and DIANE
17 DUFFRIN KELLEY,

18 Third-Party
Defendants.
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CASE NO. C08-5309BHS

ORDER DENYING THIRD-
PARTY DEFENDANTS'
MOTION TO SET ASIDE
STIPULATION OF DISMISSAL
OF PLAINTIFFS' CLAIMS
WITH PREJUDICE OR, IN THE
ALTERNATIVE, MOTION FOR
ORDER OF DISMISSAL OF
THIRD-PARTY COMPLAINT;
GRANTING THIRD-PARTY
PLAINTIFF'S MOTION FOR
DISMISSAL AND DISMISSING
THIRD-PARTY COMPLAINT
WITHOUT PREJUDICE

21 This matter comes before the Court on Third-Party Defendants' Motion to Set
22 Aside Stipulation of Dismissal of Plaintiffs' Claims with Prejudice or, in the Alternative,
23 Motion for Order of Dismissal of Third-Party Complaint (Dkt. 99) and Third-Party
24 Plaintiff's Motion for Dismissal (Dkt. 102). The Court has considered the pleadings filed
25 in support of and in opposition to the motions and the remainder of the file and hereby
26 denies Third-Party Defendants' motion and grants Third-Party Plaintiff's motion for the
27 reasons stated herein.
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I. FACTUAL AND PROCEDURAL BACKGROUND

On September 4, 2009, Plaintiffs and Defendant/Third-Party Plaintiff Old Republic Title, Ltd. filed a stipulation and informed the Court that “all claims asserted in this matter by Plaintiffs against Old Republic Title, Ltd. are dismissed with prejudice” Dkt. 98.

On September 16, 2009, Third-Party Defendants Troy X. Kelley and Diane Duffrin Kelley filed a Motion to Set Aside Stipulation of Dismissal of Plaintiffs’ Claims with Prejudice or, in the Alternative, Motion for Order of Dismissal of Third-Party Complaint. Dkt. 99. On October 5, 2009, Third-Party Plaintiff responded and requested dismissal of its claims against Third-Party Defendants without prejudice. Dkt. 102. On October 9, 2009, Third-Party Defendants replied. Dkt. 103.

II. DISCUSSION

Under the Federal Rules of Civil Procedure, claims may be voluntarily dismissed as follows:

(1) **By the Plaintiff.**

(A) Without a Court Order. Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

- (i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or
- (ii) a stipulation of dismissal signed by all parties who have appeared.

(B) Effect. Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(2) **By Court Order; Effect.** Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff’s request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff’s motion to dismiss, the action may be dismissed over the defendant’s objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

Fed. R. Civ. P. 41(a) (emphasis in original).

In this case, Third-Party Defendants originally argued that the stipulated dismissal of Plaintiffs’ claims should be set aside because it wasn’t signed by all parties who have


1 appeared. Dkt. 99 at 2. Third-Party Plaintiff responded that “Third-Party Defendants’
2 motion is unnecessary” and that Plaintiffs may dismiss their claims against Defendant
3 with or without Third-Party Defendants’ consent. Dkt. 102. In their reply, Third-Party
4 Defendants concede this issue by stating that the “sole remaining issue” is whether the
5 third-party complaint should be dismissed with or without prejudice. Dkt. 103 at 1. With
6 regard to this issue, the Court finds no reason to dismiss the third-party complaint with
7 prejudice. Neither fundamental fairness nor Third-Party Defendants’ alleged prejudice
8 counsels toward reaching the merits of the third-party complaint after a voluntary
9 dismissal of the original complaint. Therefore, the Court denies Third-Party Defendants’
10 motion and grants Third-Party Plaintiff’s motion to dismiss its claims without prejudice.

11 **III. ORDER**

12 Therefore, it is hereby

13 **ORDERED** that Third-Party Defendants’ Motion to Set Aside Stipulation of
14 Dismissal of Plaintiffs’ Claims with Prejudice or, in the Alternative, Motion for Order of
15 Dismissal of Third-Party Complaint (Dkt. 99) is **DENIED** and Third-Party Plaintiff’s
16 Motion for Dismissal (Dkt. 102) is **GRANTED**. The Third-Party complaint is
17 **DISMISSED without prejudice**.

18 DATED this 29th day of October, 2009.

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22 BENJAMIN H. SETTLE
23 United States District Judge
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